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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Portals II, Room TW-A325
Washington, DC 20554

Ex Parte Submission

Re: *Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; Connect America Fund, WC Docket No. 10-90; Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage, WC Docket No. 18-155.*

Dear Ms. Dortch,

I write to address additional issues raised in this docket, and to request that the Commission act promptly on the pending *NPRM* and update its rules in order to "Eliminate Access Arbitrage."[1]

I. Prong 1 Represents A Substantial Step Forward In Eliminating Access Stimulation, As It Would Require The Entities That Select The Transport Route To Pay The Costs Of Transport.

As indicated in AT&T's prior *ex parte* filing,[2] AT&T continues to support adoption of Prong 1 discussed in the *NPRM*, with certain modifications designed to prevent carriers from circumventing the purposes of the new rules. Prong 1 would be effective because it would reduce the ability of terminating LECs and access stimulators to force IXCs, wireless carriers, and their customers from subsidizing, via revenues derived from inefficient transport routes, the costs of access stimulation schemes. Instead, the terminating LEC—which selects the transport route and partners with the conference or chat platform providers to promote calling to its own telephone numbers—would bear most of the transport costs, and thereby receive appropriate price signals to evaluate the viability of offering a particular service.

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[1] NPRM, *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd. 5466 (2018) ("*NPRM*").

[2] Letter of M. Nodine, AT&T, to M. Dortch, FCC, CC Docket No. 01-92, *et al.*, at 1, 13-14 (filed Apr. 9, 2019) ("AT&T 4/9/19 *Ex Parte*").

A. The Commission's Current Rules Encourage Inefficient Transport Routes By Preventing Terminating LECs and Users From Receiving Accurate Price Signals.

In its prior *ex parte* filing, AT&T explained that access stimulation continues to flourish, despite the partial reform of the Commission's intercarrier compensation rules, because unscrupulous LECs and their partners retain substantial economic incentives to engage in access stimulation schemes: they can tariff and collect transport access charges at rates far above the minimal costs of transporting the traffic, and then pocket or share the revenue to fund their schemes. AT&T 4/9/19 *Ex Parte* at 2, 9-10.

Under the Commission's current rules, IXCs and wireless carriers are compelled to handle access stimulation traffic. *See id.* at 2 & nn.2-4. Yet, the terminating LECs and their access stimulation partners are able to control, via their tariffs and their election of a transport route, how and where IXCs must route the traffic—and how much IXCs must pay for transport. *Id.* at 9-10, 12.[3] Under the Commission's rules (and under the Proposed Prong 2), the terminating LECs have incentives to select costly, inefficient transport routes, so that IXCs (and their customers) pay more, and thereby fund the costs of the free or low cost calling services. *Id.* at 12, 15; *Transformation Order*, ¶ 745 ("the existing intercarrier compensation regime . . . allows carriers to shift recovery of the costs of their local networks to other providers" due to "[in]accurate pricing signals").[4]

[3] Some access stimulation LECs (either directly or via least cost routers) offer commercial arrangements for transport. The rates in these agreements, however, are well above the economic cost of providing the transport. Because the only other available alternative is the tariffed transport rate of the intermediate provider selected by the LEC (such as a centralized equal access provider), that tariffed rate acts as a "price umbrella," which permits the access stimulation LEC to overcharge for transport service The access stimulation LEC or least cost router can attract business merely by offering a slight discount from the applicable tariffed rate for transport. Because the Commission's rules disrupt accurate price signals, transport providers for access stimulation have no economic incentives to meaningfully compete on price.

[4] Callers also do not receive appropriate price signals on access stimulation traffic. Indeed, callers have strong incentives to use free or low cost calling services precisely because they are not charged the full economic costs that they cause when they place the calls: among other things, IXCs cannot pass on the higher costs of access stimulation to callers due to geographic averaging rules. *See CLEC Access Reform*, 16 FCC Rcd. 9923, ¶ 31 (2001) (noting these rules, and that users do not have the incentive to select LECs with low access charges because users do not pay most of those charges). However, because the Commission may want to retain its geographic averaging rules (and its no-blocking rules), it may be difficult for the Commission to revise its rules so that users of access stimulation services receive appropriate price signals. For that reason, Prong 1 represents the best solution, short of full ICC reform.

In short, IXCs bear the financial burden for transporting the calls, even though the terminating LECs and their partners can select the transport route. The Commission's current rules thus *prevent* accurate pricing signals and thereby encourage access stimulation schemes.

B. Prong 1 Facilitates More Accurate Price Signals.

Unless the Commission is going to complete intercarrier compensation reform at this time,[5] then it is absolutely critical for the FCC to move quickly and adopt Prong 1, as it is the best available solution to curb access stimulation. Even though Prong 1 would not eliminate above-cost transport rates on access stimulation traffic, Prong 1 would be a substantial step in the right direction.

Prong 1 would be effective in curtailing or even eliminating access stimulation because it would facilitate more accurate pricing signals. Under Prong 1, the terminating LECs would be responsible for transport costs, and would thus have the appropriate economic incentives to select efficient and shorter transport routes. *Cf. Transformation Order*, ¶ 742 (new rules should "bring market discipline to intercarrier compensation" and should give "carriers appropriate incentives to serve their customers efficiently").

If Prong 1 were adopted, the IXC would have the responsibility (and would bear the costs, as it does today) of carrying the call from the originating LEC over its long distance network, and then handing the call off at the intermediate carrier's tandem switch. Once the call is handed off, the IXC would bear no further financial responsibility, and would not make any intercarrier compensation payments to either the intermediate carrier or the terminating LEC. Instead, the terminating LEC—which selects the intermediate carrier—would pay the rates (if any) of the intermediate carrier. *See NPRM*, ¶ 13. Those rates would either consist of negotiated rates, *see Transformation Order*, ¶ 812, or the intermediate carrier's tariffed rates, which would be set under the ratemaking regime applicable to that intermediate carrier.[6]

As explained above and in AT&T's prior filings, Prong 1 would likely be an effective approach so long as the definition of access stimulation is appropriately broad, and the IXC is able to carry any access stimulation traffic to the intermediate carrier's tandem with only very

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[5] As AT&T has indicated, the Commission could move to a default bill-and-keep regime for access stimulation traffic. AT&T 4/9/19 *Ex Parte* at 11-12. In that case, for any access stimulation traffic, all rates, including transport rates of intermediate providers, would move to a default rate of zero. Like Prong 1, this solution would result in more appropriate pricing signals, because beyond the IXC's point of presence, the terminating LEC would select the transport route and be financially responsible for the transport costs. *See Transformation Order*, ¶¶ 737, 745.

[6] In situations where the terminating access stimulation LEC also serves as the intermediate access provider, then under Prong 1, that LEC obviously could not assess tariffed tandem/transport charges on an IXC or wireless company. The terminating LEC—having selected its own services as the most efficient transport route—would be responsible for those costs (and would have appropriate incentives to minimize its own costs).

limited marginal costs. This solution creates appropriate economic incentives on terminating LECs and access stimulators to reduce costs. Simply put, Prong 1, unlike the current rules, would encourage efficiency, because Prong 1 would help "reveal the true cost of the network to potential subscribers by limiting carriers' ability to recover their own costs from other carriers and their customers." *Transformation Order* ¶ 745.

However, if access stimulation LECs were able to use or to establish remotely-located tandems that would require IXCs to incur substantial costs associated with deploying new transport facilities (or substantially augmenting existing facilities), then Prong 1 is likely to further encourage arbitrage schemes. AT&T 4/9/19 *Ex Parte* at 13-14. Accordingly, if the Commission adopts Prong 1, it should clarify that IXCs have the obligation to carry traffic only to tandems in operation as of January 1, 2019 to which the IXCs already have established direct trunks.

C. *"Unwilling" LECs*.

Traditionally, with access stimulation traffic, the terminating LEC has willingly negotiated business arrangements with a conference or chat provider (and intermediate access providers typically have negotiated arrangements with the terminating access stimulation LECs). One possibility under the new rules could be that conference and chat entities would seek to compel LECs (even those not traditionally involved in access stimulation) to provide telephone numbers and/or access lines by purchasing such services from a LEC's tariff and/or service guide. The "unwilling" LEC might become subject to the access stimulation rules, and could thus be responsible for the transport costs associated with calls to the conference/chat provider. If that were to occur, the Commission should make clear that LECs can include in their tariffs reasonable provisions that allow the LECs to decline to provide such services to a chat/conference provider. Many carriers already include such terms in their service guides.[7]

[7] For example, in some of AT&T's service guides, AT&T provides that its customer may not use "AT&T service to originate or transmit Prohibited Traffic," which is defined to include "Artificial traffic stimulation, revenue pumping, regulatory arbitrage." *See e.g.*, The AT&T Business Service Guide, § 10-2 Prohibited Traffic, at https://serviceguidenew.att.com/sg_CustomPreviewer?attachmentId=00P0h00001J1PLaEAN. Alternatively, the Commission should make clear that LECs retain the ability to pass on to their end user customers all of the costs associated with carrying the access stimulation traffic to the conference/chat providers. Further, although Section 201(a) of the Act requires a common carrier to furnish service upon a customer's reasonable request, 47 U.S.C. § 201(a), the Commission should confirm that requests by a conference or chat provider for service that would result in the LEC being engaged in access stimulation, so that the LEC would incur added costs, is not reasonable. *See, e.g., Public Service Enterprise of Pa. v. AT&T*, 10 FCC Rcd. 8390 (1995), *vacated and remanded on other grounds*, AT&T v. FCC, 86 F.3d 242 (D.C. Cir. 1996) ("a carrier may refuse to provide actual service to any party that is not similarly situated with other customers of that service"); *Rogers Radio Communications Servs. Inc. v. FCC*, 751 F.2d 408 (D.C. Cir. 1985).

II. Recent Data Confirms That Access Stimulation Traffic Can Be Transferred Quickly.

In its prior *ex parte*, AT&T explained that adoption of Prong 2 would be unlikely to reduce access stimulation, and that it would in fact provide perverse incentives for access stimulators to move traffic to carriers with even more remote facilities. AT&T 4/9/19 *Ex Parte* at 14-17. Recent billing information received by AT&T only confirms that it is quite easy for access stimulators to move traffic among terminating LECs, and access stimulators have strong incentives to move traffic to terminating LECs that can extract high terminating transport access charges.

Just recently, AT&T saw a huge transfer of minutes—totaling nearly 28 million minutes—from two Iowa access stimulation LECs to two different access stimulation LECs, all which subtend the same intermediate carrier in the LERG. The volumes of traffic billed by the first set of Iowa LECs dropped last month to very low levels, while the volumes billed by two other LECs increased substantially (in an amount close to the decrease). AT&T is not certain why the traffic shifted so significantly, but it appears that the access stimulator may have simply ported telephone numbers from the first two LECs to the other two LECs, possibly to take advantage of significant mileage increases between the intermediate provider's network and the LECs' end offices, or because of the availability of alternate routes through a non-carrier intermediate transport provider who can maintain higher rates because of the price umbrella established under the tariff rates of the historic intermediate provider.

This recent billing data underscores the ability of large conference and chat providers, which have very large volumes of traffic, to move their traffic from LEC-to-LEC. It is thus essential that the Commission's new rules be implemented with an understanding of the economic incentives that lead access stimulation traffic to be shifted to terminating LECs that can collect and share a large amount of switched access charges. Prong 1 addresses this issue in part, by forcing the terminating LEC (and ultimately the access stimulator) to bear the responsibility of transporting access stimulation traffic to remote areas. Prong 2, by contrast, would encourage access stimulators to continue their schemes by seeking out terminating LECs that are very remote—and that can force IXCs to continue to pay inflated transport revenues[8] that are then used to subsidize conference and adult chat calling services.

[8] Unless costs of transport from the intermediate carrier switch are the responsibility of the terminating provider (and their platform partners) such costs will remain inflated (either because of the excessive mileage or because of an alternative provider whose services are not subject to the downward pressure that normally results from a competitive market), thus maintaining the economic incentive to continue to stimulate traffic.

The Commission should therefore not adopt Prong 2 as a solution to access stimulation and focus its efforts on Prong One as Prong One would promote a more efficient marketplace by appropriately placing the costs of access stimulation on the entity choosing the cost causer who chooses .

Sincerely,

Matt Nodine

AT&T Services Inc.

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